

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 22**

**TRUE WORLD FOODS, INC.,
NEW YORK¹**

Employer

and

CASE 22-RC-12452

**LOCAL 863, INTERNATIONAL
BROTHERHOOD OF TEAMSTERS
AFL-CIO**

Petitioner

DECISION AND DIRECTION OF ELECTION

I. INTRODUCTION

The Petitioner seeks to represent a unit of about 56 Drivers,² Drivers' Helpers, Delivery Team Leaders and Airport/Market Pickup Workers employed by the Employer. The Employer contends that the smallest appropriate unit for purposes of collective bargaining is a unit consisting of all Dispatch, Sales, Purchasing, Production and Fleet department employees.³ There is no history of collective

¹ The name of the Employer appears as amended at the hearing.

² Drivers are also referred to on the record as "Delivery Representatives."

³ The Employer seeks to include the following 131 employees who are listed by department, classification and number (in parentheses): *Dispatch Department* -- Drivers (46), Drivers' Helpers (4), Airport/Market Pickup Workers (2), Delivery Team Leaders (4), Assistant Dispatch Manager (0), Buyer (1); *Sales Department* --

bargaining for any of the employees involved here. I find, for the reasons described below, that the petitioned for unit is appropriate, and I shall order an election therein.

Under Section 3(b) of the Act, the Board has delegated its authority in this proceeding to the undersigned.

Upon the entire record in this proceeding,⁴ the undersigned finds:

1. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.
2. The Employer is engaged in commerce within the meaning of the Act and it will effectuate the purposes of the Act to assert jurisdiction herein.⁵
3. The labor organization involved claims to represent certain employees of the Employer.⁶

Outside Sales Representatives/Japanese (10), Outside Sale Representatives/American (2), Outside Sales Representatives/Korean (2), Outside Sales Representatives/Chinese (1), and Outside Sales Representatives/Live Fish (1), Night Order Clerks/Home (10), Night Order Clerks/Data Entry (4); *Purchasing Department* -- Buyers/Fulton (3), Buyers (3), Tuna Graders (1), and Night Order Clerks/Home (1); *Production Department* -- Freezer Machine Workers (2), Order Preparation Workers/Shellfish Tags (4), Order Preparation Workers (10), Plant Workers/Loading Dock (11), Production Team Leaders/American Fresh (2), Production Team Leaders/Dry Goods (1), Production Team Leaders/Frozen (1), Production Team Leaders/Tuna (2), Seafood Fillet Workers (2), Seafood Selectors(3), Tuna Cutters (3); *Fleet Department* - Fleet/Vehicle Manager (1) and Assistant Fleet Manager (1).

⁴ Briefs filed by the parties have been considered.

⁵ The Employer is a New York Corporation engaged in the wholesale sale and distribution of seafood at its Elizabeth, New Jersey facility, the only facility involved herein.

⁶ The parties stipulated, and I find, that the Petitioner is a labor organization within the meaning of Section 2(5) of the Act.

4. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Sections 9(c)(1) and 2(6) and (7) of the Act.
5. The appropriate unit for the purpose of collective bargaining within the meaning of Section 9(b) of the Act is as follows:

All full-time and regular part-time Drivers, Drivers' Helpers, Delivery Team Leaders and Airport/Market Pick Up Workers, employed by the Employer at its Elizabeth, New Jersey facility, excluding all Sales, Purchasing, Production and Fleet department employees, managerial employees, guards and supervisors as defined by the Act, and all other employees.

II. FACTS

A. Background

The Employer is engaged in the wholesale distribution of sushi grade seafood and related items from its Elizabeth, New Jersey facility to restaurants in New York, New Jersey, Connecticut, Pennsylvania and Delaware.

General Manager Tsukasa Hasegawa is in charge of the Employer's Elizabeth facility. Sales Managers Masahito Taguchi (Japanese Division) and Brian Begler (American Division) report directly to Hasegawa.⁷ Below the two Sales Managers are Purchasing Manager Seishin Daimo, Dispatch Manager Masahiro Hori and Production Manager Emmanuel Aneyji. Fleet Manager Sang S. Choe reports directly to General Manager Hasegawa, and Assistant Fleet Manager Vincent Afable reports to Choe. Michael Colucio is the Human Resource Manager, and the only witness who testified for either party at the hearing in this matter. The parties stipulated and I find

⁷ The Sales Department is divided by restaurant type into the Japanese, American, Korean and Chinese sales departments or divisions.

that the managers Hasegawa, Taguchi, Begler, Daimo, Hori, Aneyji and Colucio are supervisors, and that Assistant Fleet Manager Afable is not a supervisor within the meaning of Section 2(11) of the Act.⁸

Below the managerial level, the Employer employs Production Team Leaders, Delivery Team Leaders, and a Night Order Supervisor. These individuals are senior and experienced production employees, Drivers and a Night Order Clerk, respectively, who, in addition to their usual functions, train and assist employees within their departments and facilitate communication between departments. The parties agree that Team Leaders and the Night Order Supervisor are employees, and the record evidence does not establish that they possess any supervisory authority. Accordingly, I find that the Team Leaders and Night Order Supervisor are not supervisors under Section 2(11) of the Act.

The Employer's facility contains administrative office space located in the front of the building and on an upper level above the production areas. The Japanese Sales Department is located in the front office while the American Sales Department, Fleet Management and the building's maintenance and security staffs are located upstairs.⁹ The rear of the facility consists of a loading dock, processing areas,

⁸ The parties disagree as to the supervisory status of Fleet Manager Choe, who the Employer seeks to include in the unit. The Union seeks to exclude Choe on the grounds that he does not share a community of interests with the petitioned-for employees and is a supervisor under Section 2(11) of the Act. Because I find the petitioned-for unit of employees appropriate, I need not reach the issue of Choe's supervisory status.

⁹ Neither party seeks to include Building department employees in the unit, and I shall exclude them from the unit found appropriate. The excluded Building department classifications are Building/Grounds Manager, Building Engineer, Electrical Maintenance Worker, Maintenance Mechanic, Maintenance Worker, Receptionist and Security Guards.

warehouse areas, and the freezer. The dispatch office is located in the center of the loading dock. The front and rear of the facility are divided by a hallway, a kitchen, a cafeteria and locker rooms.

The Employer also owns and operates from its Elizabeth facility a fleet of refrigerated box trucks, flatbed trucks, pickup trucks, larger trucks, vans and cars. The Employer generally assigns a regular vehicle to each Driver, Airport/Market Pickup Worker (AMPW), Buyer and Sale Representative. Drivers and Buyers are assigned a box truck or van. The two Buyers of live fish also drive a flat bed truck specially outfitted with fish tanks for that purpose. The AMPWs are assigned larger trucks that require a Commercial Drivers' License (CDL). Sales Representatives drive pickup trucks or small cars with the back seat removed for hauling products.

Drivers, AMPWs and Sales Representatives are required to pass a Department of Transportation certification test, but only the AMPWs are required to maintain a CDL.¹⁰ The Employer requires all employees except Drivers' Helpers and Night Order Clerks to have a high school diploma or equivalent knowledge and experience. The Employer also requires certain additional qualifications for specific classifications, as noted below.

All full-time employees have the same benefits, including paid time off, medical insurance, life insurance and a 401(k) retirement plan. Part-time Night Order Clerks may participate in the life insurance policy and 401(k) plan, but receive no

¹⁰ Refrigerated box trucks and vans weigh less than 26,000 pounds, and do not require a CDL to drive.

other benefits.¹¹ All employees carry an ID card, swipe the same time clock, use the common kitchen, cafeteria and locker rooms, and are covered by a single employee handbook. The Employer provides employees with white overalls and steel tipped rubber boots for processing work. The Employer also makes available to Sales Representatives a blue company jacket and to Drivers a uniform consisting of the company jacket, light blue pants and dark blue shirts. The Employer does not require employees to wear the uniform or any items it provides to them.

In addition to the employee handbook, the Employer maintains certain written policies and procedures by department. Only Drivers are issued "Driver Daily Procedures" -- a detailed list of procedures for checking, loading and delivering products to customers. The production employees are required to follow certain standard sanitary operating procedures, safe work procedures, and forklift operating procedures, while Sales Representatives and Customer Service Representatives (CSRs) are required to follow credit and pricing guidelines.

The Employer holds various regular and *ad hoc* meetings by and between departments. Sales Representatives attend daily morning meetings (at about 9:00 a.m.) with Buyers and often hold weekly meetings with Drivers. The Sales Managers hold monthly meetings with Delivery Team Leaders and production employees. Drivers sometimes meet alone to address issues that are specific to them, as do individual groups of production employees (e.g., the Freezer Workers).

B. The Employer's Daily Operation and Employees

¹¹ Night Order Clerks are the only part-time employees employed by the

The Employer's business is operated on a 24-hour cycle, which involves taking orders from, purchasing and processing products for, and delivering products to its customers. The cycle begins at about 8:30 p.m. At about that time, eleven Home Night Order Clerks start calling lists of customers from home to solicit orders for delivery the following day. The home clerks record and fax these orders to four Night Order Data Entry Clerks and the Night Order Supervisor who work at the facility. The data entry clerks and supervisor enter the faxed orders into the Employer's computer system, print them out, and organize them by delivery route and processing area. All Home Night Order Clerks work part-time approximately four hours each night from 8:30 p.m. to 12:30 a.m., and are considered non-exempt hourly employees who earn between \$10 and \$13 per hour plus overtime.¹² Home Night Order Clerks report to the Sales Managers.

After the daily orders are submitted, seven Buyers and two AMPWs report to work between midnight and 2:00 a.m.¹³ The Buyers are primarily responsible for reviewing orders, calling suppliers, purchasing products and picking them up from the airport or the Fulton Fish Market. Three Buyers are designated as Fulton Fish Market Buyers and four are not. The Buyers also specialize in the purchase of certain products, such as live fish, dry goods or tuna. The Employer requires the Buyers to

Employer.

¹² All hourly employees employed by the Employer are paid overtime at the rate of time and one half for hours worked in excess of 40 per week. All salaried employees are considered exempt from and do not receive overtime pay.

¹³ The record does not reflect the standard hours or quitting time of Buyers and AMPWs.

have one year of prior experience in the seafood business and a valid drivers license. The Employer also prefers Buyers to have prior experience at the Fulton Fish Market and in purchasing.

The Buyers spend varying degrees of time on the road. Each day, the Fulton Buyers drive one hour each way to and from the Fulton Fish Market. The Buyers of live fish, Toyomitsu Nishinaga and Takaki Morimoto, spend more time on the road because they pick up and deliver live fish directly to customers.¹⁴ Colucio testified that Morimoto spends approximately 60% of his time on the road.¹⁵ The Buyers who specialize in tuna and dry goods do not appear to drive at all.¹⁶ All the Buyers except Morimoto report to the Purchasing Manager. The Buyers are paid salaries ranging from \$600 to \$1,000 per week with no overtime.

AMPWs pick up products from the airport and the Fulton Fish Market, and deliver products to the airport for shipping outside the Employer's regular delivery area. AMPWs also load and unload their trucks with the assistance of Loading Dock Workers and other production department employees. AMPWs consult with Sales Representatives regarding flight schedules and their arrival time at the airport so that

¹⁴ Nishinaga is the Employer's expert on live fish, and Morimoto reports directly to him. Unlike the other Buyers who are in the Purchasing department, Morimoto is classified as a dispatch department employee.

¹⁵ The record does not indicate how much time Nishinaga spends driving.

¹⁶ Tuna Buyer Katsuyuki Mochizuki works mostly inside the tuna processing room overseeing the selection and cutting of tuna loin, before going to the office to call suppliers and meet with employees who pick up the fish from the airport. Mochizuki spend about 10% of his time talking with employees who pick up the fish. Dry goods Buyer Hiroshi Watabe spends a few hours in the morning doing processing work. He then spends most of his day in the office discussing the Employer's dry goods inventory and customer needs with Sales Representatives and other Buyers, before placing dry goods orders.

the customers may be notified. AMPWs report to the Dispatch Manager, and are paid on an hourly basis between \$10 and \$15 per hour.

Once products are delivered to the facility and unloaded, production employees are primarily responsible for distributing and processing them during their hours from 2:00 a.m. to 11:00 a.m. However, other employees assist the production staff significantly. Thus, all the production employees, along with Buyers and Sales Representatives who are familiar with the daily orders, distribute products to the various processing areas by type (e.g., fresh, frozen and dry goods) and into the individual boxes of customers. Freezer Workers use forklifts to bring products from the freezer to the freezer staging area, which is warmer, to be processed. Order Preparation and Freezer Workers pick, count, weigh, assemble, label by customer, ice and pack products pursuant to the customers' orders. Loading Dock Workers, Order Preparation Workers and Freezer Workers are paid hourly between \$8 and \$12 per hour, and report to the Production Manager.

The Employer also employs skilled employees in the positions of Tuna Cutter, Seafood Fillet Worker, Seafood Selector and Tuna Grader who are responsible for rating, selecting and cutting the fish. Only the Tuna Cutters and Fillet Workers cut tuna into loins and various fish into fillets, respectively. The Selector and Tuna Grader are primarily responsible for discerning and grading the quality of fish based on such factors as color and fat content.¹⁷ However, Sales Representatives, Buyers

¹⁷ For example, the Tuna Grader inspects tuna in the processing room before it is cut into loins, and grades the fish from 1 to 3 (1 being the best). The Grader also keeps a record of the quality of fish the Employer receives from each supplier.

and fish cutters are also knowledgeable and discuss with the Selectors and Grader the quality, availability, selection and processing of fish for restaurants. Fillet Workers, Selectors and Tuna Cutters report to the Production Manager, while the Tuna Grader reports to the Purchasing Manager. The Employer requires Fillet Workers and Tuna Cutters to have three years prior experience cutting fish. The Fillet Workers earn between \$12 and \$15 per hour while the Selectors and Tuna Cutters earn between \$12 to 15 per hour. The Tuna Grader is paid a salary of \$600 per week.

Between 5:00 or 7:00 a.m., the Drivers and Sales Representatives report to work and supplement the production process.¹⁸ The Drivers and Sales Representatives talk to production employees to locate any missing items, assemble certain products, and ice and pack them for loading and delivery. Sales Representatives also help select, distribute, weigh and count products, and verify that the processed products meet customer requirements. Drivers do not perform certain production tasks, such as scaling, counting, weighing or cutting seafood.¹⁹

Drivers are primarily responsible for loading products onto vehicles and delivering them to restaurants along their regular routes.²⁰ Drivers begin their day by punching in and receiving from the dispatch office their assigned vehicle keys and route sheets. The route sheets contain the order placed by each customer, and the Driver is responsible for verifying against the route sheet that the correct products are

¹⁸ Sales Representatives report to work at 5:00 or 6:00 a.m. Drivers report to work 6:00 or 7:00 a.m.

¹⁹ The record does not indicate what production functions, if any, the AMPWs or Drivers' Helpers perform.

²⁰ Although Drivers learn more than one route so they may substitute for each other when necessary, Drivers are generally assigned a single route which they deliver every day.

loaded onto their vehicles for delivery. Production employees do help move products to the loading dock to be loaded onto trucks by Drivers and Loading Dock Workers. Sales Representatives and CSRs print invoices for Drivers to give to each customer on their routes, but they do not normally help Drivers load their vehicles. .

Drivers leave the facility to begin their routes at about 7:00 a.m. to 9:00 a.m. Throughout the day, Drivers relay customer concerns to Sales Representatives and Customer Service Representatives (CSRs) regarding such matters as deficient product quality, price adjustments, goods that must be redelivered, supplemental orders, returns and the time and sequence of deliveries. Drivers do not return to the facility until they have completed their routes, usually between about 4:00 p.m. and 7:00 p.m.²¹ Upon returning to the facility, Drivers submit to a Sales Manager a daily activity report, which states the time they arrived at and left each restaurant. Drivers also unload and store any items that were returned by customers, complete a report regarding such items and discuss the returns and other customer concerns with Sales Representatives. Colucio testified that Drivers spend approximately one to two hours each day preparing and loading goods for delivery, seven or eight hours on the road, and one half to one hour at the facility after they return. Drivers are paid on an hourly basis between \$9.50 and \$15 per hour, and gross on average between \$38,000 and \$40,000 per year including overtime. Drivers are classified as dispatch department employees and report directly to the Dispatch Manager.

Drivers' Helpers are normally assigned to accompany Drivers who make deliveries in Manhattan so they can assist with parking and the unloading of vehicles.

Alternatively, Drivers' Helpers may be assigned to work with a Driver who does not make deliveries in Manhattan, but who needs help due to an injury. Drivers' Helpers are dispatch department employees who report to the Dispatch Manager.²²

Sales Representatives are primarily responsible for soliciting business and addressing customer concerns. In the morning, Sales Representatives assist with production and talk to Buyers regarding customer needs and the availability of products. At about 9:00 a.m., they and the Buyers attend a daily sales meeting where matters such as new prices, new products and product availability are discussed. A Sales representative may be asked to make deliveries if the Employer does not have enough Drivers on a given day or if a new customer has not yet been worked into a regular route. Sales Representatives perform such deliveries in their assigned pick-up truck or car. Colucio testified that the Employer "usually has enough Drivers" and that this occurs "occasional[ly]." Sales Representatives also accompany drivers on their routes "a couple of times a month" in order to familiarize themselves with a new territory, insure that the first delivery to a new customer is handled properly or address a customer's concern in person.

²¹ Drivers are required to return to the facility, and do not park their vehicles at home overnight.

²² The record does not reflect the wage range earned by Drivers' Helpers. The Employer represented in its brief, without evidentiary support, that the Drivers' Helpers earn between \$7 and \$11 per hour.

Throughout the day, Sales Representatives address customer concerns that are communicated to them either directly or indirectly by Drivers and CSRs regarding such issues as pricing, product quality, missing items, additional orders, and the estimated time of deliveries. Sales Representatives also call and visit current customers to discuss their seafood needs, visit new restaurants with product samples and make cold calls to solicit additional business. In addition, Sales Representatives use their assigned pick-up trucks or cars to make supplemental deliveries when, for example, the quality of a delivered product was deficient, an order was placed after the Drivers have left the facility, a Driver forgot to load an item or the wrong item was loaded for delivery. Such supplemental deliveries are made daily on an *ad hoc* basis as needed.

Colucio testified that a Sales Representative's standard day includes two hours of processing work, four or five hours on the road, and an additional 25% of his time talking to Buyers. The Employer requires American Sales Representatives to be fluent in English, while Japanese, Chinese and Korean Sales Representatives must be bi-lingual in English and the language of the restaurants they service. The Employer also prefers that Sales Representatives have experience in sales or the restaurant business. Sales Representatives are paid a salary plus commission, and average about \$45,000 per year.

CSRs work eight-hour shifts at the facility beginning at about 6:00 or 9:00 a.m. When CSRs arrive, they listen to the Employer's answering machine, record late orders, enter them into the computer, print the orders and submit them for processing. CSRs and Sales Representatives also print invoices that Drivers must deliver to each

customer. Throughout the day, CSRs field calls from customers, Drivers and Sales Representatives, facilitate communication between them to resolve customer concerns, accept supplemental orders, type orders into the computer system and print out any necessary paperwork. The Employer requires CSRs to have at least one year of customer service and computer experience, and they must speak English and Japanese. CSRs are paid hourly between \$10 and \$15 per hour, they are not assigned vehicles and do not transport the Employer's products.

Fleet Manager Choe is responsible for the upkeep of the Employer's vehicles. Colucio testified that Choe spends about 80% of his time performing pre-trip inspections of vehicles, minor repairs and maintenance, and sending vehicles for repairs. Choe also performs such functions as driving a new vehicle to be used by a Driver whose truck has broken down, as necessary.

Assistant Fleet Manager Afable provides administrative support for and reports to Choe. Thus, Afable schedules vehicle repairs and keeps records of work that has been performed on the fleet. Afable also maintains and pays the bills for the Employer's cellular telephones. Choe and Afable are both paid an hourly rate of \$15 per hour. Neither Choe nor Afable transport the Employer's product.

At the time of hearing, the Employer did not employ an Assistant Dispatch Manager (ADM).²³ Former ADM Alberto Saavedra was responsible for dividing restaurant orders into different routes and distributing paperwork to Drivers. He also

²³ The Employer initially took the position that the classification of ADM should be excluded from the unit because it would not be refilled. However, Colucio later testified that the Employer intends to hire a new ADM in a week or two, and the Employer now seeks to include that classification in the unit.

fielded phone calls from Drivers regarding vehicle problems and greeted individuals making deliveries to the loading dock. Saavedra also drove a delivery route using a box truck or van when the Employer was short of drivers. The record does not indicate how often this occurred. Saavedra worked primarily in the dispatch office in the middle of the loading dock.

c. Employee Interchange

Colucio described the following instances of permanent employee interchange over the past 10 or 15 years between classifications the Employer seeks to include in the unit: Since the late-1980s, three Drivers have been hired as Sales Representatives. Fleet Manager Choe worked as a production employee and Driver, and Assistant Fleet Manager Afable worked as a Driver and ADM, before they obtained their current positions. Finally, Buyer Morimoto was formerly a sales representative and production employee. The Employer does not normally post or fill vacant positions internally.

Further, as noted above, Sales Representatives and the former ADM have been asked on occasion to make deliveries when the Employer does not have enough Drivers or if a new customer has not been worked into a regular route. Sales Representatives normally make such deliveries in the pickup truck or car they are regularly assigned, while the ADM made such deliveries in a box truck or van. Drivers who maintain valid CDLs have also been asked to substitute for AMPWs. All interchange, be it temporary or permanent, appears to be voluntary.

II. ANALYSIS AND CONCLUSIONS

The Board has rejected application of any fixed rule for the unit placement of drivers and has applied a case-by-case analysis in this area. *E.H. Koester Bakery Co., Inc.*, 136 NLRB 1006 (1962). In so holding, the Board has recognized that the complexity of modern industry generally precludes the application of fixed rules, and that drivers, specifically, often possess a dual community of interest with certain factors supporting exclusion and some factors supporting inclusion in a broader unit. When considering the unit placement of drivers, the Board will apply basic policies such as 1) the Petitioner's desire as to the unit is always a relevant consideration and 2) it is not essential that a unit be the most appropriate unit. See *Marks Oxygen Co.*, 147 NLRB 228 (1964); *Mc-Mor-Han Trucking Co.*, 166 NLRB 700 (1967); *Peacemaker Mobile Homes, a Division of Lonergan Corp.*, 194 NLRB 742 (1971); *Overnite Transportation Co.*, 331 NLRB 662 (2000); *Home Depot USA, Inc.*, 331 NLRB 1289 (2000). The "sole issue to be determined is whether or not the unit requested by the Petitioner is an appropriate unit." *Peacemaker Mobile Homes, a Division of Lonergan Corp.*, 194 NLRB 742 (1971).

Clearly, this is a case in which the petitioned-for employees share certain interests with employees the Petitioner seeks to exclude, and the unit sought by the Employer is arguably appropriate.²⁴ However, the Board has found that drivers may constitute an appropriate unit apart from other employees unless they are so integrated

²⁴ In that regard, Petitioned-for employees share common benefits, receive fairly equivalent pay, interact and perform overlapping duties with some other employees.

with a larger unit that they have lost their separate identity.²⁵ For the reasons discussed below, I find that the petitioned-for employees have maintained a separate identity and comprise an appropriate unit.²⁶

a. Sales and Customer Service Representatives

The Employer's Sales Representatives and CSRs are primarily responsible for maintaining customer satisfaction and selling the Employer's products, while petitioned-for employees are primarily responsible for transporting those products. The Board has generally excluded from petitioned-for driver units an Employer's sales representatives and driver-salesman who drive trucks and distribute products only "as an incident" of their primary sales function. *See Plaza Provision Co.*, 134 NLRB 910 (1962); *Alaska Fish and Farm Products, Inc.*, 212 NLRB 730 (1974). The Board differentiates between the interests of traditional drivers and sales people because the

²⁵ Generally, unit determinations involving drivers depend upon the following factors: (a) Whether the drivers and plant employees have related or diverse duties, the mode of compensation, hours, supervision, and other conditions of employment; and (b) Whether they are engaged in the same or related production processes or operations, or spend a substantial portion of their time in such production or adjunct activities. *E.H. Koester Bakery Co. Inc.*, 136 NLRB 1006 (1962).

²⁶ At the outset, I must reject the Employer's contention that its operation has not changed since 1989, and that a decision issued on October 16, 1989 by the then Regional Director which rejected a unit similar to the one sought by the Petitioner is controlling. In 1989, unlike now, the same employees who processed products in the morning delivered them along regular routes, and those employees reported to common supervisors (i.e., the Production Manager while processing and the Dispatch Manager while driving). Thus, there did not exist at that time a distinct group of employees who maintained a separate identity as "drivers." The remaining employees -- Salesmen, purchasers and data processing employees -- were then included in the alternative unit found appropriate because of the significant "processing work" they performed, not the time they spent driving. As discussed below, although Sales Representatives and Buyers drive, that aspect of their jobs are incidental to their primary functions, and I shall not include them in the unit I find appropriate on that basis. Accordingly, I find the 1989 case distinguishable from the instant facts, and I shall not rely on it.

value and working conditions of the later are based on qualities associated with promoting patronage while the former are not.

Here, although Sales Representatives make supplemental deliveries as necessary, only the Drivers make daily deliveries along regularly assigned routes. Thus, the Employer provides only Drivers with a detailed list of daily procedures for loading their vehicles and delivering products, while sales department employees make pricing and supply decisions subject to credit and pricing guidelines. Drivers are not involved in sales decisions other than to communicate information between the Employer's sales department and its customers.

Not surprisingly, Sales Representatives are paid a salary plus commissions while petitioned-for employees are paid hourly. The hours of Sales Representatives are determined by the time it takes them to maintain and solicit sales, while the hours of petitioned-for employees are determined by the time they spend on the road. Petitioned-for employees also drive larger vehicles than Sales Representatives to suit their different needs. Meanwhile, CSRs are not assigned vehicles at all and work fixed hours at the facility. Sales and dispatch department employees report to different managers, and there is only limited and voluntary interchange between them.

Given these facts and the record as a whole, I find that the Petitioned-for employees share a community of interests distinct from Sales Representatives and CSRs, and I shall exclude the later two classifications from the unit found

appropriate.²⁷

b. Buyers

The Buyers bear much the same relationship to the petitioned-for employees as do the Sales Representatives. Buyers must possess the skill and knowledge necessary to perform their primary function of finding, selecting and purchasing seafood to meet customer needs, while petitioned-for employees are primarily responsible for transporting those products. Accordingly, Buyers spend more time dealing with Sales Representatives, skilled production workers and suppliers discussing the availability of high quality products than with petitioned-for employees regarding pickups and deliveries. Buyers also work the same hours as only the two AMPWs, not the other drivers.

In the final analysis, like Sales Representatives, the functions of and working conditions of Buyers differ from those of the drivers who are not employees who are associated with purchasing, and the Employer treats them accordingly. Buyers are paid on a salary basis between \$600 and \$1000 per week while the petitioned-for employees are paid on hourly basis not exceeding \$15 per hour. Buyers other than Morimoto also report to the Purchasing Manager while the petitioned for employees report to dispatch. Finally, although Buyers spend, in varying degrees, time on the road, I find that such driving is incidental to their primary

²⁷ The Employer's strong reliance on *Gustave Fisher, Inc.*, 256 NLRB 1069 (1981) is misplaced, as the petitioner in that case sought a warehouse unit rather than a unit of drivers. Here, the Petitioner is seeking to represent only drivers who possess a more distinct community of interests than a warehouse unit, and can more easily be set apart in a separate unit than a broader unit of warehouse employees set apart from other facility-based employees as in *Gustave*, above.

function and that their interests are more closely aligned with excluded employees than the petitioned-for unit. Thus, I shall exclude Buyers from the unit found appropriate.

c. Assistant Dispatch Manager

The former ADM was a dispatch department employee who was responsible for providing Drivers with their daily paperwork, fielding their calls regarding mechanical problems, and driving routes when necessary. However, Colucio could not establish how often the ADM drove routes, testifying only that the Employer "usually has enough Drivers" and that coverage was need for them only "occasional[ly]." The evidence also failed to establish that the ADM maintained regular contact with petitioned-for employees throughout the day. Colucio did testify that the ADM was paid on a salary basis between \$700 and \$900 per week while petitioned-for employees are paid on an hourly basis not exceeding \$15 per hour.

Without specific evidence that the former ADM drove delivery routes on a significant and regular basis, I cannot conclude that the classification is "dual function" and must be included in the unit. See *Mc-Mor-Han Trucking Co.*, 166 NLRB 700, 702 (1967) (dual function employees shall only be eligible to vote if they regularly perform duties of unit employees for a significant amount of time). Further, I conclude that the classification of ADM does not otherwise share such a strong community of interests, by virtue of its contact, interaction or common terms and conditions of employment, with the petitioned-for unit such that it must be included

therein.²⁸ See *D & T Limousine Service, Inc.*, 328 NLRB 769 (1999); *The Salvation Army, Inc.*, 225 NLRB 406 (1976); *St. John's Associates, Inc.*, 166 NLRB 287 (1967).

d. **The Remaining Employees**

The remaining employees -- production workers, Night Order Clerks and Fleet Management -- do not transport the Employer's products, and Drivers do not perform any of the functions of Night Order Clerk or Fleet management. Although Drivers do work alongside production employees for about two hours each morning, the tasks performed by Drivers during that time are largely associated with successfully delivering the proper products to customers (i.e., obtaining route sheets and invoices, packing and verifying goods to be loaded, loading trucks, and locating missing items). Other than assembling certain products, Drivers do not perform work associated with preparing products pursuant to customer orders (i.e., scaling, cutting, counting or weighing seafood and other goods).

Drivers spend most of their day away from the facility on the road and do not return to the facility until the production employees have gone. The hours of Night Order Clerks do not overlap with Drivers or Drivers' Helpers and overlap only 30 minutes, if at all, with the two AMPWs. Most Night Order Clerks work from home rather than the facility, and the evidence does not indicate that any of the Night Order Clerks have regular contact with the petitioned-for employees. Night Order Clerks are also part-time employees who do not share the same benefits as full-time

²⁸ In so holding, I am mindful that the Employer does not currently employ an ADM and initially sought to exclude the classification on that basis and because a replacement was not being sought. It was not until the second day of the hearing that the Employer represented its intent to hire a new ADM in a week or two and its desire to include the ADM in the unit.

employees in the petitioned-for unit. As for Fleet Management, the evidence failed to establish that Choe or Afable have any significant contact, interaction or overlapping functions with the petitioned-for employees, and the record does not reflect their regular hours.

In addition to their limited interaction, the evidence revealed no significant interchange among petitioned-for employees, production employees, Night Order Clerks and Fleet Managers. The petitioned-for employees also report to separate supervision. Thus, although these employees share certain interests with the petitioned-for unit, including certain job functions and various terms and conditions of employment, I do not find their common interests so significant and interrelated as to extinguish the separate identity of the petitioned-for unit of drivers. See *Novato Disposal Services, Inc.*, 330 NLRB 632 (2000) (mechanics excluded from unit of drivers); *Mc-Mor-Han Trucking Co.*, 166 NLRB 700 (1967) (mechanics excluded from unit of drivers); *Home Depot USA*, 331 NLRB No. 168 (Aug. 25, 2000) (driver unit distinct from broader unit of employees). Accordingly, I find the petitioned-for unit appropriate and shall direct an election therein.

VI. DIRECTION OF ELECTION

An election by secret ballot shall be conducted by the Regional Director among the employees in the unit found appropriate at the time and place set forth in the notices of election to be issued subsequently subject to the Board's Rules and Regulations. Eligible to vote in the election are those in the unit who were employed during the payroll period ending immediately before the date of this Decision, including employees who did not work during that period because they were ill, on

vacation or temporarily laid off. Employees engaged in an economic strike who have retained their status as strikers and have not been permanently replaced are also eligible to vote. In addition, in an economic strike that commenced less than 12 months before the election date, employees engaged in such strike that have retained their status as strikers but who have been permanently replaced, as well as their replacements, are eligible to vote. Unit employees in the military services of the United States may vote if they appear in person at the polls. Ineligible to vote are (1) employees who have quit or been discharged for cause since the designated payroll period; (2) striking employees who have been discharged for cause since the strike began and who have not been rehired or reinstated before the election date; and (3) employees who are engaged in an economic strike that began more than 12 months before the election date and who have been permanently replaced. Those eligible to vote shall vote whether or not they desire to be represented for collective bargaining purposes by **LOCAL 863, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, AFL-CIO.**

VII. LIST OF VOTERS

In order to ensure that all eligible voters may have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties in the election should have access to a list of voters and their addresses, which may be used to communicate with them. *Excelsior Underwear, Inc.*, 156 NLRB 1236 (1966); *NLRB v. Wyman-Gordon Company*, 394 U.S. 759 (1969). Accordingly, it is hereby directed that within seven (7) days of the date of this Decision, two (2) copies of an election eligibility list containing the full names and addresses of all the eligible

voters in the unit found appropriate above shall be filed by the Employer with the undersigned, who shall make the list available to all parties to the election. North *Macon Health Care Facility*, 315 NLRB 359 (1994). In order to be timely filed, such list must be received in NLRB Region 22, 20 Washington Place, Fifth Floor, Newark, New Jersey 07102, on or before **April 22, 2004**. No extension of time to file this list shall be granted except in extraordinary circumstances nor shall the filing of a request for review operate to stay the requirement here imposed.

VIII. RIGHT TO REQUEST REVIEW

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street, N.W., Washington, DC 20570-0001. The Board in Washington must receive this request by **April 29, 2004**.

Signed at Newark, New Jersey this 15th day of April, 2004.

_____/s/ J. Michael Lightner

J. Michael Lightner, Acting Regional Director
NLRB Region 22
20 Washington Place
Fifth Floor
Newark, New Jersey 07102